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A DIFFERENT “ENLIGHTENED” JURISPRUDENCE?

DAVID R. LOY*

The failure of contemporary criminal justice is not one of technique but of purpose; what is needed is not simply new programs but new patterns of thinking.¹

INTRODUCTION

Within the last generation or so, “Enlightenment” has taken on a new meaning. Today the English word refers to more than the Aufklärung movement in eighteenth-century Europe, which offered a rationalistic critique of traditional values and institutions;² “enlightenment” has become the most common translation of various Asian (especially Buddhist) terms that describe spiritual awakening and liberation: *bodhi*, *nirvana*, *satori*, *moksha*, and so forth.³

This double meaning is fortuitous for my response to John Powell’s groundbreaking lecture *Remaking Law: Moving Beyond Enlightenment Jurisprudence*, which addresses the limitations and flaws inherent in contemporary jurisprudence insofar as it is rooted in an understanding of rationality and human nature that has become questionable. I would like to broaden the context of Powell’s thesis by offering a (not *the*) Buddhist perspective on his critique. I intend to demonstrate that a Buddhist perspective has much to contribute to the new paradigm that Powell is working towards. In an increasingly globalized world, it is important that our jurisprudence no longer be tied exclusively to a European worldview that is now somewhat dated, but should instead be informed by the best that other cultures have developed. Among that best are the sophisticated religious and philosophical traditions of South Asia and East Asia. The Buddhist perspective that follows is offered as an example of such a non-Western perspective.

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1. MARTIN WRIGHT, *JUSTICE FOR VICTIMS AND OFFENDERS* 159 (1991).

2. See James Van Horn Melton, *From Enlightenment to Revolution: Hertzberg, Schläger, and the Problem of Despotism in the Late Aufklärung*, 12 *CENT. EUR. HIST.* 103, 103 (1979).

3. *Enlightenment (concept)*, *The New World Encyclopedia*, http://www.newworldencyclopedia.org/entry/Enlightenment_%28concept%29 (last visited May 21, 2010).

One reason alternative worldviews are important is that they give us an alternative perspective to our own worldview—one that we may have been unable to see because we identify with it so completely that we see *through* it. From a Buddhist perspective, for example, the Abrahamic faiths (Judaism, Christianity, Islam) are not only monotheistic, but are also ethically preoccupied in a way that non-theistic traditions, such as Buddhism, are not.⁴ God's main way of relating to human beings is mandatory morality, which entails preoccupation with disobedience and punishment, beginning with the sin and expulsion of Adam and Eve.⁵ Historically, God's most important communication is, of course, the Decalogue, the set (actually, two sets are mentioned) of Ten Commandments.⁶ If we obey them, he will reward us, usually with eternal life in heaven; if we do not obey them, he will punish us, perhaps with eternal torment in hell.⁷ In short, Abrahamic monotheism is largely transcendently based ethics.

There is a curious and perhaps not incidental parallel between this role of God and the role of the modern state. According to the Abrahamic understanding, my violence against a fellow human being is not primarily an offense against him or her, but it is rather a violation of God's law.⁸ Substitute "the state" for "God" and the same is true for contemporary jurisprudence. The relationship between the two people involved is mediated by a third and more impersonal party. The conclusion of this essay will return to this parallel.

In contrast, although a non-theistic and non-dualistic religion such as Buddhism includes moral precepts, these precepts are not central in the same way. Moral behavior provides a foundation for following the religious path, yet an ethical life is not the same as an enlightened one.⁹ For example, Buddhism distinguishes the fruits of good *karma* from spiritual "awakening;" "the Buddha" literally means "the Awakened one."¹⁰ In place of a duality

4. John D'Arcy May, *Human Dignity, Human Rights, and Religious Pluralism: Buddhist and Christian Perspectives*, 26 *BUDDHIST-CHRISTIAN STUD.* 51, 54 (2006) (discussing how Buddhism focuses on the "endless cycle of rebirth" whereas Christianity focuses on sin and redemption).

5. A *SYNOPSIS OF THE BOOKS OF ADAM AND EVE* 2–5E (Gary A. Anderson & Michael E. Stone eds., 2d rev. ed., 1999) (presenting the story of Adam and Eve's expulsion).

6. Roger E. Van Harn, *Preface* to *THE TEN COMMANDMENTS FOR JEWS, CHRISTIANS, AND OTHERS*, at i, xii (Roger E. Van Harn ed., 2007) (presenting the Ten Commandments).

7. EDUARD NIELSEN, *THE TEN COMMANDMENTS IN NEW PERSPECTIVE* 1 (Studies in Biblical Theory Second Series No. 7, 1968) (describing how the Ten Commandments were used to inspire a fear in God and be a model for Christian living, especially in countries with a Lutheran tradition).

8. See Van Harn, *supra* note 6, at xii (describing how the Ten Commandments are a covenant with the Lord and that covenant requires the love for God and one's neighbor).

9. ELIZABETH J. HARRIS, *WHAT BUDDHISTS BELIEVE* 51 (1998) (explaining that ethical living is only the "practical foundation" of the Eightfold path).

10. HUSTON SMITH & PHILIP NOVAK, *BUDDHISM: A CONCISE INTRODUCTION* 4 (2003).

between good and evil, the Buddha emphasizes the distinction between delusion, which causes suffering, and the wisdom that is the only real solution to our unhappiness.¹¹ Expressed less dualistically, the Buddhist emphasis is on *being aware* rather than *being good*. The presumption is that an externally-enforced moral code is no longer necessary insofar as we awaken to our true nature; we will not be inclined to harm or take advantage of others once we realize our non-duality with them. This perspective is more Socratic than Abrahamic: the crucial issue is not one's *will* but one's *understanding*.¹²

This difference between the Abrahamic and Buddhist traditions enables us to ask just how secular and "religiously neutral" our Enlightenment-based jurisprudence actually is. Is it a coincidence that what is by far the world's most "religious" modern nation is also by far the world's most punitive?¹³ Although God has been expunged from Western legal codes, this world is still seen as a place where the fundamental issue is the struggle between good and evil and that the task of good people is to apprehend and punish the bad people at the root of our social problems (e.g., drug addicts).¹⁴ Much of the attraction of this moralistic worldview, I suspect, is that it is such an easy and reassuring way to make sense of a world that is complicated and confusing.¹⁵ An alternative viewpoint is offered by Ronnie Earle, longtime District Attorney of Austin, Texas: "Anyone with any sense who has ever spent much time dealing with criminals knows that most criminal behavior is the result of anger, shame, poverty, and child abuse."¹⁶ Why has it been so difficult for our judicial system to adapt to this obvious truth—to become more restorative and community-oriented? Is it because his insight is incompatible with a taken-for-granted worldview that is preoccupied with distinguishing the bad (offenders,

11. HARRIS, *supra* note 9, at 42–43.

12. *Id.* at 42–44 (describing the process of knowing "what human existence really is").

13. See NATASHA A. FROST, *THE PUNITIVE STATE, CRIME, PUNISHMENT, AND IMPRISONMENT ACROSS THE UNITED STATES*, at vii (2006).

14. See generally Peter Reuter, *Hawks Ascendant: The Punitive Trend of American Drug Policy*, 121 *POLITICAL PHARMACOLOGY: THINKING ABOUT DRUGS* 15, 17 (1992) (discussing the expenditures in the war on drugs).

15. Ironically, this simplistic duality between good and evil has often resulted in *more* evil. What were Hitler, Stalin, and Pol Pot trying to accomplish? Each of them wanted to *perfect* his society by eliminating the evil elements that interfered with its reconstruction. See Betty Glad, *Why Tyrants Go Too Far: Militant Narcissism & Absolute Power*, 23 *POL. PSYCHOL.* 1, 2 n.2 (2002) (noting that Hitler, Stalin, and Pol Pot shared similar characteristics). Of course, it is easy to dismiss (or demonize?) all three as evil themselves, but that does not inoculate us from falling into the same trap of demonizing others who disagree with our values and goals.

16. Ronnie Earle, *Restorative Justice Restores Power to Communities*, *TIKKUN* Sept.–Oct. 2009, available at http://www.tikkun.org/article.php/sept_oct_09_earle. (reviewing SUNNY SCHWARTZ & DAVID BOODELL, *DREAMS FROM THE MONSTER FACTORY: A TALE OF PRISON, REDEMPTION, AND ONE WOMAN'S FIGHT TO RESTORE JUSTICE TO ALL* (2009)).

who in secular terminology may no longer be *sinful* but are nonetheless *guilty*) from the good (the rest of us)?

I. A BUDDHIST PERSPECTIVE

The Buddhist approach to jurisprudence cannot really be separated from the Buddhist understanding of human psychology (especially motivation and intention), from its conception of the relationship between the individual and society, or from its vision of human possibility: what a good life is, or can be.¹⁷ This suggests that the challenge of creating a good judicial system may not solely be a secular challenge, insofar as issues of fairness and justice cannot be completely separated from the religious perspectives from which they are historically derived. In the past, and still today for the vast majority of people, ideas about justice are inextricably bound up with religious views and customs.¹⁸ Justice is one of those ultimate questions (like boundary issues, such as when life begins and ends) that bridge whatever distinctions we try to make between the sacred and the secular. It is no historical accident that restorative justice programs are so often promoted by marginalized Christian groups (e.g., Quakers and Mennonites) with alternative theologies.¹⁹

There are predominant themes that recur in any Buddhist analysis: offenders should be treated sympathetically because all of us, offenders and victims alike, have the same Buddha-nature. We are often dominated by greed, malice, and delusion (the “three poisons” or “roots of evil”), but it is possible to transform and outgrow them. Hence, the fundamental issue at stake in society’s response to crime is education and reformation of the character rather than punishment (“paying one’s debt to society”).²⁰ These themes derive from the Buddhist understanding of the self, an understanding which is distinctive and perhaps unique in its emphasis.

Buddhism begins not with sin or disobedience but with *dukkha*—a Pali term usually translated as “suffering”—that is understood broadly to include a basic dissatisfaction that permeates our lives until we “wake up.”²¹ Basically, Buddhists believe that the nature of an unawakened mind is to be bothered by

17. HARRIS, *supra* note 9, at 55 (discussing the Buddhist path of “pulling out the roots of greed, hatred and delusion” by virtuous living, obtained by conditioning and changing one’s “thought processes”).

18. MONICA K. MILLER, RELIGION IN CRIMINAL JUSTICE 1–4 (2006) (describing how religion affects the justice system both in and outside the courtroom).

19. Malcolm Thorburn, *The Impossible Dreams and Modest Reality of Restorative Justice*, *Review of Annalise Acorn, Compulsory Compassion: A Critique of Restorative Justice*, 30 QUEEN’S L.J. 863, 875 (2005).

20. HARRIS, *supra* note 9, at 55.

21. *Id.* at 42–44.

something.²² Our most troublesome *dukkha* is connected with our sense of self, the fundamental delusion.²³ In more contemporary terms, the sense of an “I” separate from the rest of the world—that I am *inside* and other people are *outside*—is a psycho-social construct better understood as a confluence of interacting mental and physical processes, something modern psychology has also realized. According to Buddhism, such a self is inherently insecure and uncomfortable because it is not only ungrounded, but “ungroundable”: it is not a “thing” that ever *could* become secure.²⁴ This points to the ultimate source of our anxiety, which we usually experience as a *lack*. The *sense* of self is haunted by a sense of lack—the feeling that “something is wrong with me” or “something is missing in my life.” How I objectify that sense of lack, however, varies according to the kind of person I am and the society into which I have been socialized. Growing up in the United States today, for example, I am likely to learn that my problem is that I don’t have enough money—something that would not have bothered, for example, many pre-Columbian Native Americans. For Buddhism, the basic misconception that causes us so much trouble is the belief that what is lacking is something *outside* myself, whereas the only truly satisfactory resolution of my *dukkha* is to realize that there is no discrete “I” separate from other people and the rest of the world. We must understand that we are not merely interconnected, but parts of each other, manifestations that reflect each other.

This has obvious and important implications for any judicial system. If our basic predicament is cognitive rather than ethical, what is needed is not punishment but instead some type of educational process (in the broadest sense) that encourages personal transformation. A punitive incarceration system that actually harms most offenders—and it is difficult to argue otherwise²⁵—is no more justifiable than it is effective. Instead of labeling

22. *Id.* at 42–43 (describing the un-awakened mind as “not knowing what human existence really is” and detailing its consequences).

23. *Id.* at 43 (explaining the delusion as seeing everything through “I,” “me,” and “mine”).

24. NUMERICAL DISCOURSES OF THE BUDDHA: AN ANTHOLOGY OF SUTTAS FROM THE ANGUTTARA NIKAYA 18–19 (Nyanaponika Thera & Bhikku Bodhi eds. & trans. 1999) [hereinafter NUMERICAL DISCOURSES OF THE BUDDHA].

25. The Quakers may have intended the penitentiary to be a place of penitence, yet that meaning has long been lost, and there is little doubt that incarceration makes most offenders worse. A RAND Corporation report, *Prisons Versus Probation in California*, found that recidivism is actually higher for offenders sent to prison than for similar offenders put on probation. JOAN PETERSILIA ET. AL., RESEARCH AND DEVELOPMENT CORPORATION, PRISON VERSUS PROBATION IN CALIFORNIA vii (1986), available at <http://www.rand.org/pubs/reports/R3323/>. The predatory societies that “correctional institutions” encourage make most of them more like hell than places to repent and reform. See HOWARD ZEHR, CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE 37 (3d ed. 2005). Prison settings dehumanize and seldom offer opportunities for prisoners to deal with their feelings of guilt and their need for forgiveness. *Id.* Many prisoners feel that they have been treated badly (and many have), which diverts their

people as good or bad, Buddhist psychology understands the sense of self as impermanent and malleable; it emphasizes the force of habit in place of autonomous self-determination.²⁶ According to Shakyamuni, the historical Buddha, we all have a variety of human tendencies, some of which (greed, ill will, the delusion that we are separate from each other) should be minimized, while others (generosity, loving-kindness, the wisdom of our non-duality) should be encouraged and developed: that is how we can reconstruct ourselves.

Is this approach too idealistic? Just the opposite, I think. It involves a realistic and practical attitude towards human weakness. According to Buddhism, it is the nature of unenlightened human beings to be afflicted by craving, malice, and delusion. In other words, all of us are mentally ill to some extent. There can be no presumption of Descartes's transparent self-consciousness or unfettered self-determination. As long as human beings are unenlightened, there will be crime. The extent of crime can be reduced by improving social and economic conditions, but no human society should ever expect to eradicate it.

If we are all somewhat insane, then the insanity defense is always somewhat applicable. Genuine freedom is not a matter of liberating the individual will (often motivated by greed, ill will, and/or delusion); it is a result of overcoming that kind of willfulness—not to be gained simply by removing external restraints—and, ultimately, a consequence of awakening to our non-duality and interdependence.

This challenges the moralistic distinction we are usually quick to make between an offender and the rest of us. In judicial terms, it raises questions about our preoccupation with the black-or-white question of guilty/not guilty. "Degrees of severity of the offense may vary, but, in the end, there are no degrees of guilt. One is guilty or not guilty."²⁷ Such either/or situations, Howard Zehr observes, teach "the hidden message that people can be evaluated in simplistic dichotomies."²⁸

The question of guilt is the hub of the entire criminal justice process. Establishing guilt is the central activity, and everything moves toward or flows from that event. . . . The centrality of guilt means that the actual outcome of the case receives less attention. Legal training concentrates on rules and processes related to guilt, and law students receive little training in sentence-negotiation or design.²⁹

attention from what they have done to their victims, who also lose the opportunity to work toward closure. *See id.* at 44. Moreover, prison reinforces the low self-confidence and sense of failure that lead many prisoners to offend. *See id.*

26. NUMERICAL DISCOURSES OF THE BUDDHA, *supra* note 24, at 14.

27. ZEHR, *supra* note 25, at 67.

28. *Id.* (citing NILS CHRISTIE, LIMITS TO PAIN 45 (1981)).

29. *Id.* at 66.

From a perspective that takes the offender's self-reformation seriously, such an approach is seriously flawed:

[O]ffenders are constantly confronted with the terminology of guilt, but denied the language and clarity of meaning to make sense of it. . . . Western law and values often are predicated on a belief in the individual as a free moral agent. If someone commits a crime, she has done so willfully. Punishment is thus deserved because it is freely chosen. Individuals are personally and individually accountable. Guilt is individual. . . . Much evidence suggests that offenders often do not act freely or at least do not perceive themselves as capable of free action. . . . Ideas of human freedom and thus responsibility necessarily take on a different hue in such a context.³⁰

A Buddhist perspective supports the notion that preoccupation with guilt is based on an erroneous understanding of human nature and conclusion about the best way to change human nature.³¹ "Guilt says something about the quality of the person . . . and has a 'sticky,' indelible quality. Guilt adheres to a person more or less permanently, with few known solvents. It often becomes a primary, definitional characteristic of a person."³²

In contrast, the Buddhist emphasis on impermanence and the insubstantiality of everything (very much including the sense of self) implies that one's character is a never-ending *process*, for there is nothing indelible about our unwholesome mental tendencies.³³ Deep-rooted habits become difficult to eradicate because they are a residue of past actions and ways of thinking, not because they are an immutable part of us.

If free will is not presumed and encouraging self-reformation is the most important issue, primary concern shifts from ruling on the suspect's guilt to determining his or her intention (*cetana*). By no coincidence, intention—more precisely, volitional action—is also the most important factor in the operation of the law of *karma*, according to Buddhism.³⁴ The basic point about karma is that each person is "the owner of his actions, the heir of his actions; his actions are the womb (from which he has sprung), his relations and his protection. Whatever he does, good or bad, he will be heir to that."³⁵ This doctrine is complex and controversial, but any Buddhist understanding of karma will emphasize what Buddhism calls *sankharas*—our "mental formations" or habitual tendencies.³⁶ The notion that the sense of self is a construct means that these tendencies are not something the self *has* but tendencies that the

30. *Id.* at 70.

31. Richard H. Jones, *Theravada Buddhism and Morality*, 47 J. AM. ACAD. RELIGION 371, 373 (1979).

32. ZEHR, *supra* note 25, at 69.

33. Jones, *supra* note 31, at 373.

34. NUMERICAL DISCOURSES OF THE BUDDHA, *supra* note 24, at 17.

35. *Id.* at 141.

36. *Id.* at 19.

sense of self is: the usually-habitual expression and interaction of these tendencies is what constitutes my sense of “me.” That does not mean such *sankharas* are ineradicable: unwholesome ones are to be differentiated from the liberatory possibilities that are available when one makes the effort to replace them with more wholesome mental tendencies.³⁷

The important point about this explication of karma is that we suffer or benefit most not for what we have done, but for what we have become, and that what we intentionally do is what makes us what we are. At that point, the important issue becomes the development of those intentions: just as food is assimilated to (re)constitute my physical body, so “my” volitional actions (re)constitute my character. If karma points to this psychological truth about how we (re)construct ourselves, then, to say it again, the focus of our judicial systems should shift from retributive punishment to reformation and education in the broadest sense.

The classic—although flawed—example of Buddhist reformation is the *Angulimala Sutta*,³⁸ one of the earliest Buddhist texts. Angulimala was a merciless bandit and serial killer who wore the fingers of his victims as a garland (hence his name, literally “finger garland”).³⁹ When Angulimala encounters the Buddha, however, the Buddha performs a feat of supernatural power. Angulimala, walking as fast as he can, cannot catch up with him, even though the Buddha is walking at his normal pace. Astonished, Angulimala calls out “Stop!”⁴⁰

Still walking, the Buddha answers: “I have stopped, Angulimala, you stop too.”⁴¹ In response to Angulimala’s puzzlement, he explains: “I have stopped forever, I abstain from violence towards living beings; but you have no restraint towards things that live.”⁴² This implausibly impresses Angulimala so much that he renounces evil forever and asks to join the Buddhist monastic order, and the Buddha welcomes him as a new *bhikkhu* (monk).⁴³

Meanwhile, King Pasadeni has gone forth to capture Angulimala with a cavalry of five hundred men.⁴⁴ When he meets the Buddha and explains his quest, the Buddha responds: if you were to see that he is now a good *bhikkhu*, who abstains from killing living beings, how would you treat him?⁴⁵ The king

37. *See id.*

38. THE MIDDLE LENGTH DISCOURSES OF THE BUDDHA: A NEW TRANSLATION OF THE MAJJHIMA NIKAYA (Bhikkhu Nanamoli & Bhikkhu Bodhi trans., 1995) [hereinafter MIDDLE LENGTH DISCOURSES OF THE BUDDHA].

39. *Id.* at 710.

40. *Id.* at 711.

41. *Id.*

42. *Id.* at 711.

43. MIDDLE LENGTH DISCOURSES OF THE BUDDHA, *supra* note 38, at 711–12.

44. *See id.* at 712.

45. *See id.* at 712–13.

replies that he would pay homage to him as a good *bhikkhu* and is surprised when the Buddha points out Angulimala seated nearby.⁴⁶ The king marvels that the Buddha was able to tame the untamed and bring peace to the unpeaceful.⁴⁷ "[W]e ourselves could not tame him with force or weapons, yet the Blessed One has tamed him without force or weapons."⁴⁸ The king then departs, after paying homage to the Buddha.⁴⁹

Soon after, the now venerable Angulimala, diligent and resolute, realizes for himself the "supreme goal of the holy life" and attains *nirvana*.⁵⁰ Later, while collecting alms, he is attacked and beaten by irate townspeople.⁵¹ The Buddha tells him to "[b]ear it," for it is a result of his past *karma*.⁵² The *sutta* concludes with some verses Angulimala utters while experiencing the bliss of enlightenment, for example:

Who checks the evil deeds he did
By doing wholesome deeds instead,
He illuminates the world
Like the moon freed from a cloud.⁵³

This legend is obviously more embellished myth than historical truth, though some scholars suspect that it may have a factual basis.⁵⁴ It is also flawed in two ways: Angulimala's change of heart is too easy, of course, and, more importantly, unsatisfactory from a restorative point of view. The *sutta* says nothing about the families of Angulimala's victims or the larger social consequences of his crimes. That the humble monk Angulimala is stoned by villagers indicates more than bad *karma*. It implies that there has been no attempt at restorative or transformative justice that takes account of his effects on society. The social fabric of the community has been torn, yet the particular situation of the offender is addressed by abstracting him from his social context and from those affected by his offenses.

Nevertheless, the importance of this story within the Buddhist tradition highlights the only reason Buddhism accepts for punishing an offender: to help reform his or her character. Then there is no reason to punish someone who has already reformed himself. There is no mention of punishment as a deterrent. On the contrary, the case of Angulimala may be seen as setting a

46. *See id.* at 713.

47. *See id.*

48. MIDDLE LENGTH DISCOURSES OF THE BUDDHA, *supra* note 38, at 713–14.

49. *See id.* at 714.

50. *See id.* at 714–15.

51. *See id.* at 715.

52. *Id.*

53. MIDDLE LENGTH DISCOURSES OF THE BUDDHA, *supra* note 38, at 715.

54. *See* RICHARD F. GOMBRICH, HOW BUDDHISM BEGAN: THE CONDITIONED GENESIS OF THE EARLY TEACHINGS 135–64 (1996) (examining multiple versions of the *sutta* to discover the truth behind Angulimala myth).

negative example, implying that one can escape punishment by becoming a *bhikkhu*, as if the Buddhist *sangha* were something like the French foreign legion. There is no hint that punishment is needed to annul the crime, although Angulimala does suffer karmic consequences, which even his *nirvana* cannot escape. More generally, determining which judicial response is right or wrong—what is *just*—cannot be abstracted from the particular situation of the offender, including his social context.

II. TIBETAN JURISPRUDENCE

Traditional Tibetan jurisprudence (i.e., prior to 1950) provides an example of how well a Buddhist-based jurisprudence can function to maintain social order and harmony.⁵⁵ The presupposition of Tibet's legal system was that conflict is engendered by our incorrect vision of situations, a vision itself caused by mental afflictions.⁵⁶ In Tibetan Buddhist teachings there are six root afflictions (desire, anger, pride, ignorance, doubt, and incorrect view) and twenty secondary afflictions (including belligerence, resentment, spite, jealousy, and deceit) that cause us to misperceive the world and engage in disputes.⁵⁷ To say it again, this is a Socratic-like understanding of human conflict: our unethical behavior is ultimately due to our wrong understanding, which only a spiritual awakening can wholly purify.

As long as our vision is incorrect and our minds are afflicted, there can be no question of free will, and Tibet's judicial system did not presuppose it. "The goal of a legal proceeding was to calm the minds and relieve the anger of the disputants and then—through catharsis, expiation, restitution, and appeasement—to rebalance the natural order."⁵⁸ A judge's responsibility was not to maintain a supposedly impartial neutrality (contra Chief Justice John Roberts' self-declared approach, according to John Powell)⁵⁹ but to supervise this process of calming and reharmonizing.⁶⁰ "A primary purpose of trial

55. See REBECCA REDWOOD FRENCH, *THE GOLDEN YOKE: THE LEGAL COSMOLOGY OF BUDDHIST TIBET* 138 (1995) (noting that traditional Tibet strove for consent and agreement between the parties of a dispute in order to "reharmonize themselves and the community after a bitter fight").

56. See *id.* at 73.

57. See *id.*

58. *Id.* at 74.

59. John A. Powell & Stephen Menendian, *Remaking Law: Moving Beyond Enlightenment Jurisprudence*, 54 ST. LOUIS U. L.J. 1035, 1035–36 (2010).

60. See FRENCH, *supra* note 55, at 137–38 (stating that judges would seek for the parties within a dispute to reach a consensus as to the facts within a case); see also *id.* at 139 (indicating that consensus brought reharmonization and helped to "dispel the parties' mental afflictions, such as anger or jealousy").

procedure was to uncover mental states if possible, and punishment was understood in terms of its effect upon the mind of the defendant."⁶¹

This included the disputants attempting to reharmonize their relations after a court settlement. For example, the law codes specified a "getting together payment" to finance a meeting where all the parties would drink and eat together to promote reconciliation.⁶² Generally, coercion was considered ineffective, for no one could be forced to follow a moral path.⁶³ The disputants had to work out their own difficulties to find a true solution and end the conflict.⁶⁴ Therefore, even a decision accepted by all parties would lose its finality whenever they no longer agreed to it, and cases could be reopened at any later date.⁶⁵

This focus on ending strife and calming the mind implied a different attitude towards the use of legal precedents. Emphasis was on decisions harmonizing the group, rather than on decisions in harmony with more abstract legal principles.⁶⁶ In general, local and nongovernmental decision makers were believed to be likely to find solutions that would actually rectify behavior and work within the community to restore harmony.⁶⁷

Reharmonizing was embodied both in the legal philosophy and in the different types of judicial processes used to settle problems. Legal analysis followed Buddhist teachings in distinguishing two basic forms of causation: the immediate cause and the root cause.⁶⁸ Because the source of animosity between the parties had to be addressed to resolve the conflict, the root cause was generally considered the more important form of causation.⁶⁹ Internal settlement between the parties was the most common type of judicial process.⁷⁰

61. *Id.* at 76.

62. *See id.* at 139.

63. Under Buddhism, individuals had the choice to act morally or immorally, but the individual's choice had consequences on his karma. *Id.* at 76.

64. FRENCH, *supra* note 55, at 138 ("A civil suit could not be addressed in most forums without the consent of both parties. A case was not considered settled until there was agreement as to the facts, and a judicial decision (even in a murder case) had a subsequent requirement of consensus among all parties.").

65. *Id.* at 139 ("[E]ven after a signed document had been issued by a conciliator or a court, the case could be reconsidered by the parties at any later date.").

66. *Id.* at 137. For instance, "truth" was based on consensus between the disagreeing parties rather than an ideal or separate standard: "facts given by both sides had to agree, not with reality (in any corresponding sense) but with each other." *Id.*

67. *Id.* at 319–25. In order to rectify behavior and restore harmony within the community, five core concepts were considered in criminal cases: "(1) the uniqueness of each case; (2) 'what is suitable for punishment'; (3) considerations of karma; (4) the correct purposes of punishment; and (5) the correct types of punishment." *Id.* at 316.

68. *Id.* at 142.

69. FRENCH, *supra* note 55, at 142.

70. *Id.* at 121.

If internal settlement attempts failed, conciliation, using private and unofficial conciliators, could be tried. Parties generally preferred this process because it was informal, saved reputations, allowed flexible compromises, and was much less expensive.⁷¹ Official court proceedings were a last resort.⁷²

Emphasis on consensus and calming the mind also presupposed something generally accepted in Tibet but less so in the West today: a belief that only the mind, and not material possessions or status relations, that can bring us happiness.⁷³ This contrast highlights the more individualistic assumptions that operate in American judicial systems, which instead emphasize the personal pursuit of happiness, freedom from restraint by others, and the right to enjoy one's property without interference. In practice, Tibetan officials were careful to distinguish religious beliefs from secular legal views when it came to settling a case; crimes and disputes had to be settled in this world, without referring to karmic causes or effects, which are ultimately unknowable.⁷⁴ Nonetheless, Tibetan culture was permeated with a spiritual mentality; the moral example and standard of the Buddha influenced every part of the legal system.⁷⁵

Stories, parables, and *jataka* tales (accounts of the Buddha's former lives) offered countless social examples of how the virtuous and the nonvirtuous actor operated in the daily world and provided Tibetans with a concrete understanding of proper action. Each Tibetan knew that the moral Buddhist cared more for the welfare of others than for his or her own welfare, gave to others rather than amassing a fortune, rigorously tried to prevent harm to others, never engaged in any of the nonvirtuous acts, had complete devotion to the Buddha and his path, worked to eliminate anger and desire for material goods, accepted problems with patience and endurance, and remained an enthusiastic perseverer in the quest for truth and enlightenment. As there was no confusion about this ideal, there was little ambiguity about how the moral actor would deal with a particular daily situation. Even though the average Tibetan may not have been any more likely to follow the moral path than a person in any other society, his or her understanding of that ideal path remained strong. Moreover, that understanding prevailed in reasoning about legal cases, even over reasoning connected with community standards.⁷⁶

Insofar as all societies require models of how to live, like norms and sanctions, what comparable standards prevail in Western cultures? Despite a plurality of models, Western standards tend to be more competitive and atomistic. In United States law, for example, "the question becomes 'Would a

71. *Id.* at 122.

72. *Id.*

73. *Id.* at 75.

74. FRENCH, *supra* note 55, at 81.

75. *Id.* at 79.

76. *Id.* at 77 (emphasis added).

reasonable person leave ice on the sidewalk and foresee harm to a passerby?' The court and the individuals are not expected to know or to ask the moral question 'What would a correctly acting moral human have done under the same circumstances?'"⁷⁷ By contrast, the accepted standard in Tibet was based not on "the reasonable man," but on the moral person exercising self control.⁷⁸ The members of a Tibetan village or neighborhood recognized that they had responsibility for other members of the group; conversely, an adult in the United States has no legal duty or responsibility to help others unless there are special circumstances.⁷⁹ "Tibetans find such an attitude repulsive and inhuman."⁸⁰

To sum up, traditional Tibet provides an example of a judicial system organized according to a very different type of jurisprudence, one which emphasized reformation of character and restoration of social harmony. Nevertheless, any attempt we might make to incorporate those principles into Western jurisprudence would seem to be vitiated by one obvious problem: Buddhist Tibet was not a secular society.⁸¹ As Rebecca Redwood French emphasizes, Tibet did not have an autonomous legal system, for its framework of "legal cosmology" was derived from the Tibetan worldview—a worldview which was almost entirely embedded in a Buddhist cultural base.⁸² For a Tibetan, then, there was no clear division between religion and the state.⁸³ Such a system is difficult to harmonize with modern Western judicial systems, which have evolved to fit secular and pluralistic societies.⁸⁴ For the United States, in particular, a distinction between religious affiliation and civil authority is essential.⁸⁵

But how sharp is that distinction? Is our jurisprudence an "Enlightened" secular alternative to such a religiously based legal cosmology, or is it merely unaware of its own religious origins and commitments? There is nothing unique about Tibet's legal system being derived from its worldview; that fact is true of any legal system. Ours, too, is embedded in a particular worldview, which we take for granted just as much as Tibetans assume a Buddhist cosmology. My concluding section reflects on whether, for us, the role of *the Buddha* in Tibet has been assumed by *the state*. This implies a rather different perspective on modern judicial systems.

77. *Id.* at 80.

78. *Id.* at 79.

79. FRENCH, *supra* note 55, at 141–42.

80. *Id.* at 142.

81. *Id.* at 345.

82. *Id.* at 346.

83. *Id.*

84. FRENCH, *supra* note 55, at 16.

85. *See* U.S. CONST. amend. I.

III. A GENEALOGY OF JUSTICE

[L]aw is our national religion; lawyers constitute our priesthood; the courtroom is our cathedral, where contemporary passion plays are enacted.⁸⁶

Our understanding of justice, like every understanding of justice, is historically constructed. If we want to reconstruct our jurisprudence, then it is important to understand how we got to where we are now. But there is no “perspectiveless” perspective. A Buddhist concern for a more reformatory and restorative justice enables us to see the history of jurisprudence in a new way.

In premodern Anglo-Saxon and Germanic law, the notion of a wrong to a person or his family was primary and that of an offense against the “common wealth,” was secondary.⁸⁷ In other words, the distinction between civil and criminal law hardly existed, even for the gravest offenses. For example, the notion that killing is a crime—an offense against the *community*—did not exist until the state gained the power to enforce penalties for such offenses.⁸⁸ As monarchies grew more powerful, private settlements of crimes that rulers regarded as public wrongs were not permitted because these settlements were understood to undermine the crown’s authority.⁸⁹ Centralization of the crown’s power meant that kings could assume the judicial role and enforce their judgments.⁹⁰ This was justified by their new royal role as personifications of the social order: “the king, in whom centers the majesty of the whole community, is supposed by law to be the person injured by every infraction of the public rights belonging to that community.”⁹¹

This development was reinforced by another in the religious sphere.⁹² Christianity initially emphasized the importance of forgiving wrongdoing.⁹³ Like Buddhism, early Christian practice was focused on the importance of reconciliation within a social context, emphasizing spiritual salvation and one’s ultimate destiny.⁹⁴ Beginning in the eleventh century, however, theology and common law began to redefine crime as an offense against the divine

86. JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?: RESOLVING DISPUTES WITHOUT LAWYERS*, 9 (1983).

87. WRIGHT, *supra* note 1, at 2. “The Anglo-Saxons adopted the principle, also found among Germanic tribes, that offenders should make two payments of composition for injuries other than homicide, *bót* to the injured party and *wite* to the lord or king.” *Id.* at 3.

88. *Id.* at 5–6. In 1255, Henry III began to impose monetary penalties for murder. *Id.* at 4.

89. *Id.* at 4. King Henry II in response to concerns with judicial and administrative reforms, “claimed jurisdiction over the main crimes (‘pleas of the crown’) such as homicide, robbery and rape.” *Id.* at 5.

90. *Id.*

91. *Id.* at 6 (citing Blackstone 1778/1973: 187, 192).

92. WRIGHT, *supra* note 1, at 6.

93. *Id.*

94. *Id.*; see also VIRGINIA MACKEY, *PUNISHMENT: IN THE SCRIPTURE AND TRADITION OF JUDAISM, CHRISTIANITY AND ISLAM* 18 (1983).

order, that created a moral imbalance that needed to be righted, which meant retribution.⁹⁵ Crime became a sin against God and, as such, it became a part of the responsibility of the Church (God's agent on earth).⁹⁶ Here, too, the focus shifted away from reharmonizing the relationship between offender and offended. Now their relationship is mediated and objectified, because the offense is really against God.⁹⁷

These two developments intersected in the sixteenth and seventeenth centuries, when the Reformation initiated a social crisis that culminated in the birth of the nation-state as we know it today.⁹⁸ The schism within Christendom increased the leverage of civil rulers, and the balance of power between Church (sacred authority) and state (secular authority) shifted dramatically to the latter.⁹⁹ This shift allowed some rulers to appropriate the Church's traditional role and prestige. Their power became absolute because they filled the new vacuum of spiritual authority by becoming, in effect, "secular gods" accountable not to the Pope but only to God.¹⁰⁰

Thanks to reformers such as Luther and Calvin, who postulated a vast gap between corrupt humanity and God's righteousness, the deity was now too far away to interfere with the absolute authority of secular rulers.¹⁰¹ Luther and Calvin also endorsed the punitive role of the state, which assumed what remained of God's role in administering punishment.¹⁰²

Eventually, of course, various revolutions overthrew these absolute rulers, but their supreme power did not disappear; rather, the power remained centralized in the impersonal authority of the modern state, and its institutions were freed from responsibility to anything outside themselves since they now "represented the people."¹⁰³

This gives us a different perspective on the state's role as the legal victim of all crimes, with a monopoly on the determination and application of justice. Can the modern nation-state be understood as a solely secular institution, or is our historically conditioned allegiance to it due to the fact that it took over some of the religious authority of schismatic Christianity? The impersonality of state justice led to emphasis on formal law and due process, which meant a focus on bureaucratic results (and thus on legal precedent) with little regard for

95. MACKEY, *supra* note 94, at 41–43.

96. *Id.* at 20.

97. STEPHEN E. TOULMIN, *COSMOPOLIS: THE HIDDEN AGENDA OF MODERNITY* 57 (1990).

98. *Id.* at 89–91.

99. *Id.*

100. *See id.* at 90–91.

101. Wolfgang Reinhard, *Reformation, Counter-Reformation, and the Early Modern State: A Reassessment*, 75 CATH. HIST. REV. 383, 385–87 (1989).

102. Jesse Couenhoven, *Grace as Pardon and Power: Pictures of the Christian Life in Luther, Calvin and Barth*, 28 J. RELIGIOUS ETHICS 63, 68 (2000).

103. TOULMIN, *supra* note 97, at 97.

the effects of this process on its participants.¹⁰⁴ The objectivity of bureaucratic procedure engendered trust in the institution, which took the form of law and respect for law. But there was a price:

As trust diminishes among individuals, bureaucracies, particularly legal bureaucracies, become more integral to the maintenance of social order and ultimately to the existence of society itself. In this context, law can be viewed as being inversely related to personal trust. With respect to trust, bureaucracy can be viewed as the antithesis of community.¹⁰⁵

Today, too, the breakdown of local communities continues to create “mobile and atomized populations whose claim to humanity rests more and more on the assertion of individual rights vis-à-vis an impersonal, distant, and highly bureaucratized government apparatus.”¹⁰⁶

Within the context of liberalism, we are controlled by *atomism* and *contract*. Our unity with others is based almost exclusively on the belief that such an association will advance our own self-interest. In our rational assessment of situations, we are therefore unlikely to enter into a relationship with an individual who is unable, at least theoretically, to advance our own interests. Such an unwillingness of our part excludes those with little power and few assets from engaging in contractual relations, thus creating the social problems (e.g., crime, poverty, unemployment, etc.) that have plagued the liberal democracies. In our unwillingness to involve ourselves personally with such individuals, we have surrendered community control of these problems to the state.¹⁰⁷

Our unwillingness to engage with the poor and powerless follows naturally from the belief that our own well-being is separate from their well-being—a duality and delusion that “karmically” returns to haunt us.

All this implies a different perspective on Hobbes’s social contract theory,¹⁰⁸ which may not be reliable as an historical claim but is nonetheless revealing. Hobbes offers a view of human nature very different from Buddhism: our distinctive quality is egoism, more precisely “a perpetual and restless desire for Power after power.”¹⁰⁹ The clash of our egoisms causes a social chaos whose only antidote is “that mortal God,” a sovereign who is able to establish order because it is to the advantage of all others to submit to his

104. *Id.* at 10.

105. J. Peter Cordella, *Reconciliation and the Mutualist Model of Community*, in *CRIMINOLOGY AS PEACEMAKING* 30, (Harold E. Pepinsky & Richard Quinney eds., 1991).

106. Joseph Camilleri, *Human Rights, Cultural Diversity, and Conflict Resolution*, 6 *PACIFICA REV.* 17, 24 (1994).

107. Cordella, *supra* note 105, at 37–38.

108. THOMAS HOBBS, *LEVIATHAN* 92 (Richard Tuck ed., Cambridge Univ. Press 1994) (1651).

109. *Id.* at 70.

authority.¹¹⁰ "The state, created *ex nihilo*, was an artificial ordering of individual parts, not bound together by cohesion as an organic community, but united by fear."¹¹¹

This gets at the heart of the issue: the contrast between the mutuality of genuine community and the fear that motivates Hobbes's contractual and punitive state composed of competing individuals. According to Hobbes, the state's order is externally imposed upon its subjects, because in a social contract, the self-interest of others is perceived as a constant threat to our own self-interest—"except [that] they be restrained through fear of some coercive power, every man will distrust and dread each other."¹¹²

What does this have to do with a Buddhist perspective on jurisprudence? The important issue is the social *context* of justice and the historical developments that have shaped our understanding of that context—a context we usually take for granted, but which is becoming increasingly questionable. As Hobbes makes clear, fear is the origin of the modern state and its jurisprudence, for the state is the only thing that can protect my self-interest from yours.¹¹³ Whether or not this is true historically, it has become our myth: we legitimize the state's justice insofar as we accept that it is needed to protect us from each other. But is there any alternative?

Harold Pepinsky, in a discussion of Buddhism, has pointed out that the problem of justice is part of a broader issue: how can all our relationships be just and peaceful?¹¹⁴ And even more generally, how can humans get along? When conflict occurs, how can we restore peace instead of responding in kind? If this is the main problem, the issue of a good judicial system must be subordinate to our larger vision of how people are related to each other.¹¹⁵ Buddhist teachings agree with Pepinsky that conflict is inevitable as long as we are the kind of people we are; the issue, then, is how to learn from these conflicts. Pepinsky writes,

Unless we can make peace in the privacy of our own homes, men with women, adults with children and with older people, we cannot build peace outside in our other workplaces and in our nations. Research on peacemaking in criminology thus becomes the study of how and where people manage to make peace, under the assumption that the principles that create or destroy peace are the same from the Smith family kitchen to the Pentagon and the prison.¹¹⁶

110. *Id.*

111. TOULMIN, *supra* note 97, at 211–12.

112. THOMAS HOBBS, *MAN AND CITIZEN* 99 (Bernard Gert ed., Anchor Books 1972) (1658).

113. *Id.*

114. Harold E. Pepinsky, *Peacemaking in Criminology and Criminal Justice*, in *CRIMINOLOGY AS PEACEMAKING*, *supra* note 105, at 299, 303–04.

115. *Id.*

116. Pepinsky, *supra* note 114, at 305.

The implication, of course, is that judicial systems should focus on transforming offenders, restoring relationships, and reharmonizing communities.¹¹⁷ This itself harmonizes with the definition of justice that Ronnie Earle, the Austin District Attorney, offers: “Justice is the fairness and balance that come from healthy relationships.”¹¹⁸ In place of the usual inquiries—“Whodunnit? What laws were violated? How are we going to punish the offender?”—he prefers to ask: “What is the harm? What needs to be done to repair the harm? Who is responsible for this repair?”¹¹⁹ Earle offers three reasons for developing such “community restorative justice:”

First, it is what people want, because it empowers them. Second, it is what victims want because they get to participate. And third, it is what the public wants because it speaks to that internal sense of justice that we all share. All of these reasons make restorative justice good politics.¹²⁰

And good jurisprudence? We are left with two contradictory paradigms about the origins and role of justice. How do we decide between them? Which kind of society do we want to live in?

117. *See id.*

118. Earle, *supra* note 16, at 19.

119. *Id.*

120. *Id.*